

- PRE ELECTOR

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Practitioner's Docket No. TAL: 7146.0089

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant : Zeng, Wenjun

Group Art Unit: 2623

Serial No.: 09/687,727

Examiner: Wu, Jingge

Filed : 12/08/2000

Title : DISTORTION-ADAPTIVE VISUAL FREQUENCY WEIGHTING

Patent :

Issued:

Chernoff, Vilhauer, McClung & Stenzel, L.L.P.  
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April 25, 2005

Mail Stop 16  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**ATTENTION: Refund Section, Accounting Division, Office of Finance**

**REQUEST FOR REFUND**

Dear Sir:

**I. Refund Request**

This is a request for a refund, with respect to the fee for a petition for Revival of an Application for Patent Abandoned Unavoidably for the above identified

☒ application.

☐ patent.

A copy of check no. 69125 for the petition fee is enclosed.

## II. Fees Charged For Which Refund Is Requested

- ☐ Filing Fee
  - ☐ Surcharge for filing the basic filing fee on a date later than the filing date of the application (37 CFR §1.16(e))
  - ☐ Surcharge for filing the oath or declaration on a date later than the filing date of the application. (37 CFR §1.16(e))
  - ☐ Extension of time
    - ☐ first month
    - ☐ second month
    - ☐ third month
    - ☐ fourth month
    - ☐ fifth month
  - ☐ Excess claims
  - ☐ Issue Fee
  - ☒ Petition Fee
  - ☐ Patent Maintenance Fee
    - ☐ first maintenance fee
    - ☐ second maintenance fee
    - ☐ third maintenance fee
  - ☐ Patent maintenance fee surcharge
  - ☐ Other
- TOTAL REFUND REQUIRED**

[illegible]

III. EXPLANATION OF REASON FOR REFUND REQUEST

III. EXPLANATION OF REASON FOR REFUND REQUEST

On 2 December, 2004, the Office mailed a Notice of Abandonment alleging failure to reply timely and properly to a Restriction Requirement mailed on 8 September, 2003. The applicant filed a Petition for Revival of an Application for Patent Abandoned Unavoidably Under 37 U.S.C. 1.137(a) and submitted the required petition fee. The petition asserted that a timely response to the restriction requirement had been filed on 16 September, 2003 and no notice had been received from the Office that the response was improper in any way. Attached is a copy of the decision granting the petition.

The applicant submits that the Petition to Revive was necessitated solely by the error of the Office in issuing a Notice of Abandonment mistakenly alleging failure to timely and properly reply. Therefore, the applicant requests a refund of the fee for a petition that should have been unnecessary.

#### IV. MANNER OF REFUND

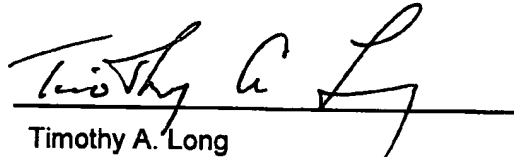
Please make refund by

- ☒ crediting Deposit Account No. 03-1550
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UNITED STATES PATENT AND TRADEMARK OFFICE

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**OFFICE OF PETITIONS**

In re Application of

Zeng, et al.

Application No. 09/687,727

Filing Date: 8 December, 2000

Attorney Docket No. TAL: 7146.089

This is a decision on the petition filed on 27 January, 2005, alleging, *inter alia*, unavoidable delay under 37 C.F.R. §1.137(a).

For the reasons set forth below, the petition as considered under 37 C.F.R. §1.137(a) is

**GRANTED.**

**BACKGROUND**

The record reflects that:

- Petitioner failed to reply timely and properly to the Restriction Requirement mailed on 8 September, 2003, with reply due absent extension of time on or before 8 October, 2003;
- the instant application went abandoned after midnight 8 October, 2003;
- the Office mailed a Notice of Abandonment on 2 December, 2004;

- with the instant petition (with fee authorization), Petitioner submits the required reply (election), alleges timely transmittal of the reply to the Office, and supports the allegation with evidence of a transmittal letter/form with election bearing a certificate of mailing.

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>1</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.<sup>2</sup>

Delays in responding properly raise the question whether delays are unavoidable.<sup>3</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>4</sup> And the Petitioner must be diligent in attending to the matter.<sup>5</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>6</sup>))

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<sup>1</sup> 35 U.S.C. §133 provides:  
**35 U.S.C. §133 Time for prosecuting application.**  
Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

<sup>2</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>3</sup> See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>4</sup> See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

<sup>5</sup> See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

<sup>6</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

The requirements for a grantable petition under 37 C.F.R. §1.137(a) are the petition and fee, a showing of unavoidable delay, a proper reply, and--where appropriate--a terminal disclaimer and fee if the application was filed before 8 June, 1995.

Petitioner has satisfied the requirements of the regulation.

CONCLUSION

The instant petition under 37 C.F.R. §1.137(a) hereby is granted.

The file is forwarded to Technology Center 2600 for further processing in due course.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.



John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

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 PORTLAND, OREGON 97204-3157

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69125

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USAN PACIFIC, INC. # 7186.0089	

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12/1/08	Director of the Pat & Family	Petition to have 69125	69125	\$ 500.00

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*[Signature]*

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